

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 7, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1260**

**Cir. Ct. No. 2008CF123**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSEPH WAYNE EVANS, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Marinette County:  
JAMES A. MORRISON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Joseph Evans, Jr., pro se, appeals the denial of a postconviction motion without an evidentiary hearing. We affirm.

¶2 Evans was convicted following a jury trial for the first-degree intentional homicide of his estranged wife, and criminal damage to property.

Evans broke into the Marinette trailer home where his estranged wife was staying and kicked in her television set, sliced the arm of a couch, and splattered paint on the couch, love seat, hope chest, curtains and a clock. Three weeks later, Evans fatally shot his estranged wife in the chest.

¶3 On direct appeal, Evans challenged the admissibility of other acts evidence and expert testimony. We affirmed Evans' conviction. *See State v. Evans*, No. 2010AP1294-CR, unpublished slip op. (WI App April 26, 2011).

¶4 In affirming the conviction, we concluded the circuit court properly exercised its discretion in admitting the expert testimony. We also held the other acts evidence was properly admitted to rebut Evans' claim that the shooting was an accident. We concluded the other acts evidence was relevant to show motive and context, among other things, as the evidence bore parallel similarities of responding to rejections by intimate partners with threats and violence. In addition, Evans sought in each instance to excuse his conduct or hide his responsibility by claiming an accident.

¶5 We also held that any error that could somehow be assumed in admitting the other acts evidence was harmless because the evidence of first-degree intentional homicide was otherwise overwhelming.<sup>1</sup> By way of example, we noted that a neighbor heard arguing inside Evans' trailer just before hearing a gunshot. The neighbor also testified that after the shooting, Evans' daughter drove up while Evans was outside, and Evans swore at her and told her to leave. Jurors

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<sup>1</sup> We did not reach the issue of whether any error that could be assumed by admitting the expert testimony was harmless because Evans did not reply to the argument and the issue was therefore deemed waived.

also heard evidence that Evans was especially angry on the day of the shooting, because he had just been served with a temporary restraining order on the victim's behalf.

¶6 Evans himself also testified, "We fought a lot, bust[ed] things up." Evans recalled "four [or] five restraining orders." Evans' daughter testified that Evans threatened the deceased victim's safety "[a]ll the time," and that Evans told the victim "[s]he would go six feet under."

¶7 Our supreme court denied Evans' petition for review. Evans subsequently filed a petition for writ of habeas corpus, raising numerous claims of ineffective assistance of appellate counsel. Evans also raised claims of ineffective assistance of trial counsel. We denied the petition. *State v. Evans*, 2011AP2476-W, unpublished slip op. (WI App Feb. 11, 2013). Our supreme court denied Evans' petition for review.

¶8 Evans also filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06.<sup>2</sup> The circuit court denied that motion, and Evans now appeals.

¶9 Evans' current arguments have been waived, forfeited, or are procedurally barred. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). However, Evans presents such a multitude of claims that we choose to address the merits. We conclude that Evans' allegations are conclusory, unsupported by factual assertions that would entitle him to relief, and contrary to law. The circuit court therefore properly denied the postconviction motion

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<sup>2</sup> References to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

without an evidentiary hearing. *See State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

¶10 First, Evans argues the trial court erred by admitting testimony of the deceased victim's sister regarding statements allegedly made by the victim to Evans in the sister's presence. The sister testified that on the day he damaged the victim's property, Evans came to her apartment three or four times to talk to the victim. On the third or fourth visit, Evans stated to the victim that they were still married, and she responded in a loud and vocal manner, "[W]ell, not for long because I am divorcing you and just ... get that through your head and ... leave me alone." Evans seemed very agitated and eventually left only to return later to do damage to the belongings.<sup>3</sup>

¶11 Contrary to Evans' perception, the deceased victim's statement, overheard by her sister, was not offered for the truth of the matter asserted. Rather, the testimony was introduced to show the impact of the victim's statements on Evans' behavior. Therefore, the statement was not hearsay.

¶12 Moreover, even if we could somehow assume the statement was hearsay, it was a statement of the victim's then-existing state of mind and fits within the hearsay exception for excited utterances. *See* WIS. STAT. § 908.03(2). The testimony would also be admissible as residual hearsay. The testimony established that the deceased victim's statement was made in a heated and intimate conversation that fit seamlessly with Evans' version of events, thus bolstering the

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<sup>3</sup> The deceased victim's sister also testified that later that same day, she had a telephone conversation with Evans, and he claimed that he had a pistol and that he was going to "hunt [her] down." At trial, Evans admitted that he was angry with the victim that day, and that he did do the damage to her belongings.

circuit court's finding of trustworthiness. *See* WIS. STAT. § 908.045(6). Finally, the statements were nontestimonial, and thus did not violate the right to confrontation. *See State v. Manuel*, 2005 WI 75, ¶¶60-61, 281 Wis. 2d 554, 697 N.W.2d 811.

¶13 Evans next argues the prosecutor improperly withheld gunpowder residue evidence from the deceased victim's hands. The autopsy report indicates the victim's hands were swabbed. However, there is nothing in the record to indicate that gunpowder residue testing was performed on the swabs. Thus, there is nothing to indicate such evidence was improperly withheld by the prosecution.

¶14 Even if such testing had occurred, the results would not likely have aided the defense. The evidence showed that the victim was shot at very close range, and therefore it was possible that gunpowder would appear on the victim regardless whether she touched the gun. Evans' arguments do not cause us to conclude that speculative gunpowder residue test results from the victim's hand swabs would be sufficient to undermine our confidence in a trial with otherwise overwhelming evidence of intentional homicide.

¶15 Evans further argues that this court should "set aside" our prior ruling on direct appeal concerning the use of other acts evidence, and "re-review it as prosecutorial misconduct." Evans' claim of prosecutorial misconduct is conclusory and unsupported by any factual assertion that would entitle him to relief. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Regardless, our prior ruling on other acts evidence is the law of the case and shall not be set aside.

¶16 Next, Evans contends trial counsel was ineffective for failing to communicate a plea offer. However, Evans fails to provide citations to the record

on appeal that would demonstrate the existence of a plea offer. We will therefore not further consider the argument. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). In any event, the lead prosecutor confirmed in an affidavit to the circuit court that no offer was ever contemplated, let alone communicated to defense counsel.

¶17 Evans also argues trial counsel was ineffective for failing to seek the suppression of evidence obtained in the search of Evans' trailer home pursuant to a warrant. Evans complains that the State obtained the deceased victim's cell phone, "which was placed into evidence, and later the State used the recorded messages Evans[] had left on [the victim's] voice mail against him at trial." He also contends that counsel should have attempted to invalidate the search warrant because it was issued by a court commissioner.

¶18 However, Evans does not allege that the court commissioner lacked authority to issue a warrant. Furthermore, his argument that counsel should have challenged the warrant is again conclusory and unsupported by any factual assertion that would entitle him to relief. *See Toliver*, 187 Wis. 2d at 360.

¶19 Evans next claims trial counsel was ineffective for withdrawing a motion for mistrial because the annex door of the courthouse was locked on the first day of trial sometime after 4:30 p.m. and before 6:30 p.m. However, the circuit court found that although the annex door was inadvertently locked, all other doors to the courthouse remained open. Accordingly, multiple doors to the courthouse remained open and the public was not excluded from the trial.

¶20 According to Evans, trial counsel was also ineffective for failing to request a hearing to investigate a possible conflict of interest between the district attorney's office and the special prosecutor. This case was not prosecuted by the

Marinette County District Attorney's Office; rather, a special prosecutor was appointed. Evans appears to argue the special prosecutor should have been disqualified because of a relationship with the district attorney who newly hired two of Evans' former attorneys. However, the special prosecutor, through an affidavit to the court, affirmatively stated that he did not receive any information from Evans' former attorneys. Evans thus fails to supply any facts that would support a finding of a conflict of interest.

¶21 Evans also argues trial counsel was ineffective for failing to seek admittance of the deceased victim's toxicology report. Evans claims the report would establish that the victim was more likely to grab the firearm due to intoxication. However, this argument is inconsistent with Evans' own testimony.

¶22 Evans testified at trial that he was familiarizing himself with a pistol he had purchased a week prior. According to Evans, he was loading a magazine when the victim walked through the door. He claims he got up to greet her, pistol in hand. When the victim saw the gun, Evans testified she reacted by immediately reaching for it, causing it to discharge accidentally.<sup>4</sup>

¶23 In other words, Evans testified that the victim was startled and reacted in a consistent manner. There is no indication that intoxication had any relation to the victim's reaction, and Evans offers no legitimate reason why the victim's toxicology would have made his version of events any more plausible. Moreover, Evans fails to explain how the admission of a toxicology report would

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<sup>4</sup> When police arrived at the scene in response to a call that someone had been shot, they asked Evans what happened. Evans responded, "[S]he was around when I was cleaning my gun."

be sufficient to undermine confidence in our conclusion on direct appeal that the evidence of intentional homicide was overwhelming.<sup>5</sup>

¶24 Finally, Evans argues he is entitled to a new trial in the interests of justice. We conclude the real controversy was fully tried and there was no miscarriage of justice. *See* WIS. STAT. § 752.35.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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<sup>5</sup> Evans also argues his postconviction counsel was ineffective for many of the same reasons he alleges ineffective assistance of trial counsel. Because we have concluded there was no deficient performance by trial counsel, we need not further address Evans' arguments postconviction counsel was ineffective on the same grounds.



